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No. 79-1806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BISSO TOWBOAT COMPANY,
Petitioner,

versus

LEO BAZILE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

REPLY BRIEF OF PETITIONER

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PETITIONER'S ARGUMENT ADDRESSED TO THE ISSUE FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

In his Brief in Opposition, Leo Bazile advances no arguments and cites no authority in support of the application of the *Lavender v. Kurn*[1] "any evidence" test to

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1 327 U.S. 645

the jurisdictional issue of seaman's status. Instead, and as evidence that no such arguments or authorities exist, Bazile contends that the United States Court of Appeals for the Fifth Circuit did not apply the *Lavender v. Kurn* test but rather the "reasonable basis" standard of *Boeing Co. v. Shipman*[2] in reversing the Trial Court's grant of a judgment notwithstanding the jury verdict as to status. Because this argument was first raised in Bazile's Brief in Opposition, Bisso Towboat Company feels compelled to address its lack of merit herein in accordance with Rule 24(4) of this Honorable Court.

In short, Bazile repeatedly quotes and cites the following section of the Fifth Circuit's opinion in support of its contention that the *Lavender v. Kurn* standard was not applied:

> We find that even applying the less strict standard of *Shipman,* the granting of the motion for a judgment notwithstanding the verdict was improper. There was sufficient testimony from the plaintiff to support a verdict that he was a seaman.[3]

Bazile argues that these two isolated sentences, and apparently just the first, mean that *Boeing Co. v. Shipman* and not *Lavender v. Kurn* governed the decision of the Fifth Circuit. As the following will illustrate, Bazile has

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2 411 F.2d 365

3 606 F.2d 101, at 104; Respondent's Brief in Opposition pp. 3, 4, 5 and 7.

taken this portion of the Fifth Circuit's opinion out of context.

Initially and without even looking to other parts of the Fifth Circuit's opinion, it is readily apparent from the use of the word "even" in the first sentence of the above quoted portion of the opinion that the Fifth Circuit was not actually applying *Boeing Co. v. Shipman* but rather indicating that, in its opinion, it would make no difference *to the outcome* of the case if that decision, rather than *Lavender v. Kurn*, were controlling. This is a far cry from holding that *Boeing Co. v. Shipman* states the rule of law upon which the case was decided, and this Honorable Court should not be misled by Bazile's "selective quotations."

That Bazile has quoted the Fifth Circuit out of context, and that the "any evidence" test of *Lavender v. Kurn* was actually applied to the jurisdictional issue of seaman's status, is apparent from the first paragraph of the opinion, below, to-wit:

> It is also true that under *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945) the trial judge in a Jones Act case is bound by a stricter rule — only when there is a complete absence of probative facts supporting the verdict can he grant a motion for a judgment notwithstanding the verdict. 327 U.S. at 653, 66 S.Ct. 740.

Plainly, had the Fifth Circuit not actually been applying *Lavender v. Kurn* to the jurisdictional issue of sea-

man's status, it would not have distinguished the rule it believes appropriate in Jones Act cases from the *Boeing Co. v. Shipman* rule applicable to all other matters.

In summary, Bazile, armed with no arguments supporting the application of *Lavender v. Kurn* to the jurisdictional issue of seaman's status, has resorted to throwing up a "smoke screen" in an effort to cloud the issues sufficiently enough for denial of the Petition for Certiorari herein. Should that tactic be successful, the Fifth Circuit's opinion below will hereafter interdict the trial bench in that circuit from ever taking the jurisdictional issue of seaman's status from the jury, even after a jury finding that has no reasonable basis. The unfortunate consequences set forth in Petitioner's original brief would then follow.

CONCLUSION

For these reasons, Bisso Towboat Company urges this Honorable Court to see beyond Bazile's misleading tactics, to issue the writ of certiorari as prayed for, and to, in due course, reinstate the "reasonable basis" standard of *Boeing Co. v. Shipman* as the test for determining the jurisdictional issue of seaman's status.

Respectfully submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing Reply Brief of Petitioner were served on Darryl J. Tschirn, Esq. and John M. Robin, Esq., of Covington, Louisiana, this date by mailing same as required by Rule 33(1) of this Court.

New Orleans, Louisiana, September ____, 1980.

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WINSTON EDWARD RICE